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IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA *ex rel.*
JACK J. GRYNBERG

PETITIONER,

V.

PRAXAIR, INC. AND NIELSON & ASSOCIATES, INC.,

RESPONDENTS.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARK D. COLLEY
Counsel of Record
CRAIG A. HOLMAN
KRISTIN E. ITTIG
CAMERON W. FOGLE
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 955-3000

Counsel for Respondent Praxair, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Praxair, Inc. ("Praxair") hereby states that it has no parent corporation. Praxair further states that no publicly held company owns ten percent or more of Praxair's stock.

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FACTUAL BACKGROUND

Respondent Nielson & Associates, Inc. ("Nielson") produces carbon dioxide ("CO_2") gas from wells drilled on lands leased to it by the federal government. It sells this gas to Respondent Praxair, Inc. ("Praxair") under an arms-length contract. Praxair processes the raw gas into purified food-grade products (i.e., liquid CO_2 and dry ice), which it sells commercially. Under their contract, Praxair pays Nielson a price per ton for the CO_2 based on the volume of finished product that the raw CO_2 gas will yield (i.e., output measured at the processing plant "tailgate"). Nielson then calculates and pays royalties to the government based on the gross proceeds of its sales to Praxair. The U.S. Department of the Interior's Bureau of Land Management ("BLM") and Minerals Management Service ("MMS") have regulatory oversight responsibility for the CO_2 production and royalty activity. Petitioner Jack J. Grynberg ("Grynberg") brought this False Claims Act, 31 U.S.C. §§ 3729 et seq. (2005) ("FCA") action alleging that royalties had been fraudulently underreported because they were calculated on the basis of (i) plant tailgate volumes (rather than wellhead volumes), and (ii) the contract price Praxair paid (rather than the prices at which Praxair sells its food-grade products).

Ignoring or distorting many of these basic facts, Grynberg's Petition presents a "Factual Background" that is exceedingly misleading. In particular, Grynberg's description of "Government Involvement" alludes only to questions addressed during multiple government investigations of the same royalty reporting practices that Grynberg challenged. Omitted are the consistent and repeated approvals by responsible federal regulators of the identical activity that Grynberg's complaint labeled as fraudulent.

The undisputed, documented record confirms that the very practices to which Grynberg objects were assessed and approved by the government at least in 1985, 1987, 1989, 1996 and 2000. United States ex rel. Grynberg v. Praxair, Inc., 389 F.3d 1038, 1044-46 (10th Cir. 2004); United States ex rel. Grynberg v. Praxair, Inc., 207 F. Supp. 2d 1163, 1067-73, 1178-79 (D. Colo. 2001), aff'd in part, rev'd in part, 389 F.3d 1038 (10th Cir. 2004). This is not merely an FCA case where the government declined to intervene and prosecute Grynberg's complaint. Instead, and unusually, in this case the cognizable federal authorities provided sworn testimony, with full knowledge of Grynberg's charges, that the Respondents have complied with all royalty regulations and that *there is no fraud.* Praxair, 207 F. Supp. 2d 1171-72. Grynberg's Petition thus asks the Court for a third chance to argue for why he should be allowed to sue *on behalf of the United States* in order to challenge conduct that the government has repeatedly and unequivocally approved.

The specific practices of which Grynberg complains – royalty value based on plant tailgate volume and the Nielson/Praxair contract price – were publicly disclosed before Grynberg filed his *qui tam* complaint. First, they were disclosed through a Freedom of Information Act ("FOIA") disclosure that the MMS made to Grynberg. In that disclosure, MMS provided Grynberg with the redacted text of a 1985 letter describing the challenged practices. The disclosed letter itself resulted from an administrative investigation of the challenged practices. Because it revealed the challenged practices (redacting only the specific price) the district court held that the FOIA response constituted a sufficient public disclosure to preclude the *qui tam* case from proceeding. Id. at 1183-84.[1]

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[1] The District Court also held that through a 1996 investigation, the challenged practices were publicly disclosed to an individual who was previously unconnected to the practices. Id. at 1184.

It is irrefutable that the exact measurement and valuation practices to which he objects were publicly disclosed in the FOIA response before Grynberg filed his complaint. While Grynberg attempts to limit and discredit the FOIA response's import by describing it only in part (omitting its most pertinent disclosures) and mischaracterizing what it reveals, that same approach was correctly described by the Tenth Circuit as "disingenuous."[2] Praxair, 389 F.3d at 1051. Moreover, although Grynberg recites as "facts" various personal speculations that he converted into complaint allegations, he fails to report that in response to motions for summary judgment, following extensive discovery, he was unable to provide any substantiating evidence for these claims.

SUMMARY OF THE ARGUMENT

The genesis of Grynberg's petition for a writ of certiorari is a patently frivolous FCA action concerning publicly disclosed royalty practices under an arms-length contractual relationship between Praxair and Nielson that the government approved on numerous occasions. In short, as the Tenth Circuit ruled, Grynberg's FCA claim suffered fundamental factual and legal flaws, and was precisely the type of parasitic action that the attorneys' fee provision in 31 U.S.C. § 3730(d)(4) was designed to discourage. As such, judgment against Grynberg and the decision regarding

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[2] As discussed below in connection with his characterization of the decisions in this and other cases, Grynberg continues before this Court a consistent pattern of unreliable advocacy. See Praxair, 207 F. Supp. 2d at 1186 n.22 (questioning authenticity of a "suspect" document purporting to be a pre-filing disclosure to the government that Grynberg produced only after discovery and after representing at the summary judgment hearing that there was no such evidence); Appendix at 17a (Magistrate describing as "incredible" and "far fetched" Grynberg testimony seeking to overcome a protective order).

sanctions under § 3730(d)(4) are neither questionable nor controversial and certainly do not warrant further review by this Court.

Despite this reality, Grynberg has made a final and desperate push to keep his action alive. In much the same way that he attempted to manufacture a fraudulent conspiracy between Praxair and Nielson, Grynberg now attempts to manufacture divisions in the circuits or important questions of federal law in order to justify this Court's intervention. He fails on both fronts. No court in any circuit would have allowed Grynberg's claim to proceed because he failed meet the threshold *qui tam* requirements set out in 31 U.S.C. § 3730(e)(4) under every circuit's interpretation of that provision. Similarly, no opinions conflict with the Tenth Circuit's application of the attorneys' fees provision in § 3730(d)(4). Moreover, the *only* party that would assign importance to the issues Grynberg raises in his petition is Grynberg himself, and that "importance" is limited to a self-interested desire to evade paying Praxair's attorneys' fees as a consequence of having brought a frivolous action.

REASONS FOR DENYING THE WRIT

I. A "Public Disclosure," From A Source Recognized Under The FCA, Revealed The Essential Elements Of The Fraud Alleged.

Grynberg's Petition seeks to invent a conflict between the Tenth Circuit's ruling in this case and the law in other jurisdictions. His first argument thus opens with a tour of various perceived FCA ambiguities and conflicts among the circuit courts, but none of them are implicated by this case. In fact, Grynberg's arguments never directly confront this case. There is no conflict between the Tenth Circuit's actual

application of the statute in this case and either the language of the FCA or the approach taken in other circuits.

Grynberg's first Question Presented for Review is framed as an inquiry into whether the FCA's "public disclosure" bar applies "when the Relator's complaint is drawn from sources or information which are not listed in 31 U.S.C. § 3730(e)(4) . . ." The implication is that Grynberg's complaint was not based on a listed source. Instead, Grynberg argues that the lower court invented some sort of new "public domain" test and denied jurisdiction because Grynberg relied on public information disclosed in sources other than those recited in the FCA. This is an entirely false premise, and misrepresents both Grynberg's complaint and the Tenth Circuit's reasoning.

The Tenth Circuit's actual analysis started by acknowledging the district court's holding that "the transaction underpinning Grynberg's allegations, valuation at the tailgate pursuant to the terms of the Agreement, was publicly disclosed twice. The first such disclosure was when the MMS sent its response to Grynberg's FOIA request." Praxair, 389 F.3d at 1049. The circuit court then explained the district court's finding that:

> [T]his disclosure revealed both the location at which the royalty would be measured (the tailgate) and how the price [charged to Praxair] would be calculated (a formula based on the adjusted fair market values), thus disclosing the basis of allegedly fraudulent transactions.

Id. Grynberg's Petition alludes to other facts in the FOIA response, but ignores this fundamental revelation.

Instead, Grynberg's Petition notes that the FOIA response described plant ownership and gas title, the fact of price adjustment, and processing steps. He claims that without the sales price and production details, the FOIA information does not describe a fraud. (Petition at 12-13.) Before the Tenth Circuit, however, Grynberg took a different approach, arguing that the FOIA response did not communicate the basis for his fraud claim because it did not include a specific statement that gas volume would be established for royalty purposes at the plant tailgate, and that gas valuation would be based on contract price rather than the price at which Praxair sold finished products. Praxair, 389 F.3d 1049-50.

The Tenth Circuit rejected Grynberg's analysis, explaining that the FOIA response alone "contained all the elemental aspects of the allegedly fraudulent transaction." Id. at 1050. The court explained that the FOIA response, even without showing specific prices "revealed the existence of the Agreement, the point of production (the wellhead), . . . the purchase point (the tailgate), and the fact that the price was adjusted at the tailgate. Grynberg's claim that the document did not state where the royalty would be valued is disingenuous." Id. at 1051. Again, assessing solely the FOIA response, the court concluded that:

> [T]he document identifies the tailgate as the location of pricing and the fact the price will undergo adjustments. The only reasonable conclusion from these statements is that the royalty will be valued at the point of sale, and such location may entail a loss of value in the base amount used for royalty calculations.

Id. Grynberg thus merely disagrees with the factual conclusions reached by the lower courts, and now seeks a

third level of factual review as to the nature of the FOIA response.

Grynberg's Petition also argues that the Tenth Circuit incorrectly relied on Grynberg's use of other publicly available information to support its holding that there had been a "public disclosure" barring the claim. In reality, the court found that this additional information would not overcome the fact that the FOIA disclosure itself was sufficient under the statute to bar the claim:

> Clearly, X (wellhead as opposed to tailgate volumes) and Y (purchase and price adjustment at the tailgate) were within the public domain [via the FOIA response]. Therefore, Grynberg's "additional information, even if nonpublic, cannot suffice to surmount the jurisdictional hurdles." All of the material elements of the fraudulent transaction were already in the public domain....[T]he transaction was publicly disclosed by a listed source[.]

Id. (citations omitted). Although Grynberg's Petition makes much of the fact that he added information to what the FOIA response disclosed, the Tenth Circuit unequivocally found that Grynberg's additional information was insufficient to overcome the fact that the underlying transaction was publicly disclosed through the MMS FOIA response.[3]

Grynberg may disagree with the court's appraisal of the FOIA information, but he is disingenuous once again to suggest that the Tenth Circuit invented a new "public domain

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[3] Not only did the Tenth Circuit not conflict with analytical approaches of other circuits, it explained how Grynberg failed the public disclosure test even under the analytical approach from another circuit that Grynberg had advocated below. Praxair, 389 F.3d at 1049.

test," or that it relied on any standard or analysis in conflict with the FCA and all applicable precedents. The court did not rest on the fact that Grynberg supported his claim with other public information in addition to the FOIA response. Instead, it concluded that the FOIA response revealed the essential character of the transaction on which Grynberg's claim was premised (tailgate volume measurement; contract price values). Every circuit court to have considered the question (and every case Grynberg cites) applies the public disclosure bar to prohibit FCA claims when a public disclosure from a requisite source reveals the basis for the fraud.[4] There is no conflict between the Tenth Circuit's application of the statute and either the language of the FCA or the approach taken in other circuits.

II. The Tenth Circuit Properly Held That Grynberg's Allegations Were "Based Upon" The Public Disclosure.

Grynberg's second question presented for review is also based upon a distortion of the Tenth Circuit's analysis. Grynberg contends that the court rejected his complaint allegations by comparing them to information in the "public domain," instead of concluding that the complaint was "based upon" the FOIA revelations. The Tenth Circuit said unequivocally, however, that there is "no question that the information disclosed by the MMS is the basis for his claim." Praxair, 389 F.3d at 1052. Although the court noted the other information Grynberg presented, it concluded that the complaint was based on the material released by the MMS pursuant to the FOIA. Id.

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[4] Grynberg does not dispute that the FOIA disclosure constitutes a listed source in the FCA. (Petition at 12.)

Quoting the Tenth Circuit's decision out of context, Grynberg ignores the court's conclusion that the key element of the alleged fraud is "valuation at the tailgate," which was disclosed in the FOIA response. Id. The court's analysis did not cover any "gap" by reference to other information sources, as Grynberg argues. Instead, the Court assessed the evidence that Grynberg submitted to the government in support of his allegations, consisting of (a) the MMS FOIA response, and (b) two memos regarding plant costs and product prices that "do not change the basis for his allegations." Id. Thus, the only evidence upon which Grynberg purported to base his allegations was the FOIA material, leading the court to conclude that "Grynberg's complaint is based on a publicly disclosed transaction under 31 U.S.C. § 3730(e)(4)(B)." Id. In other words, the court's "based upon" analysis rested entirely on "the information disclosed by the MMS," and then discounted the relevance to the complaint allegations of the other public information Grynberg relied upon. There was no newly invented "public domain test" applied.[5]

Moreover, Grynberg's contention that the Tenth Circuit's decision rests on "deep divides among the circuits" is illusory. Grynberg suggests that there is a stark contrast between those circuits that treat the FCA's "based upon" test as meaning "supported by" and those circuits viewing that

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[5] Grynberg's allusion to "venting" is more distortion. Grynberg's allegations were based on any differences between wellhead and tailgate volumes, whether due to venting, other plant or processing losses, or removal of non-CO_2 gasses. His Amended Complaint alleged an improper processing deduction, with venting issues coming into play only later. Praxair, 207 F. Supp. 2d at 1175. His claim was that royalty volumes, in order not to be reported unlawfully, had to be measured exclusively at the wellhead. As the court below noted, neither his complaint, nor his report to the U.S. Attorney rested on allegations related to venting, regardless of the source of that information. Praxair, 389 F.3d at 1052.

language as meaning "derived from." (Petition at 18.) The Tenth Circuit's treatment of the FCA's "based upon" test, however, is in accord with the vast majority of courts of appeals. Eight circuits agree with the Tenth Circuit that the "based upon" test means "supported by." See United States ex rel. Dingle v. BioPort Corp., 388 F.3d 209 (6th Cir. 2004), cert. denied, 125 S. Ct. 1708 (2005); Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1045-47 (8th Cir.), cert. denied, 537 U.S. 944 (2002); United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh, 186 F.3d 376, 385-88 (3d Cir. 1999), cert. denied, 529 U.S. 1018 (2000); United States ex rel. Biddle v. Bd. of Trs. of the Leland Stanford Jr. Univ., 161 F.3d 533, 539 (9th Cir. 1998), cert. denied, 526 U.S. 1066 (1999); United States ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 688-89 (D.C. Cir.), cert. denied, 522 U.S. 865 (1997); Fed. Recovery Servs., Inc. v. United States, 72 F.3d 447, 451 (5th Cir. 1996); Cooper v. Blue Cross & Blue Shield, 19 F.3d 562, 567 (11th Cir. 1994); United States ex rel. Doe v. John Doe Corp., 960 F.2d 318, 324 (2d Cir. 1992).[6]

Only two circuits have had a slightly different treatment. The Fourth Circuit has read the "based upon" language in § 3730(e)(4)(A) to mean "derived from." See United States ex rel. Siller v. Becton, Dickinson & Co., 21 F.3d 1339, 1348-49 (4th Cir.), cert. denied, 513 U.S. 928 (1994). The Siller decision, however, was predicated upon a finding that the relator did not rely on the publicly disclosed information.

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[6] This Court has refused to grant certiorari on this issue several times in the past. See, e.g., Mistick, 186 F.3d at 385-88, cert. denied, 529 U.S. 1018 (2000); United States ex rel. McKenzie v. BellSouth Telecommunications, 123 F.3d 935, 939-41 (6th Cir. 1997), cert. denied, 522 U.S. 1077 (1998); Findley, 105 F.3d at 688-89, cert. denied, 522 U.S. 865 (1997). Grynberg provides no novel or compelling reason for a different result here.

By his own admission, Petitioner relied on the FOIA response.[7] Similarly, the Seventh Circuit in dicta noted that the "derived from" definition of "based upon" was compelling, but found it unnecessary to make a definitive ruling because the complaint failed under either definition of "based upon." See United States v. Bank of Farmington, 166 F.3d 853, 863-64 (7th Cir. 1999). Such passing and inconsequential differences certainly do not warrant this Court's intervention.

Even if the Court agrees that there are "deep divides among the circuits" regarding the FCA's "based upon" test, such a division would have no impact on Grynberg's case. The supposed significance of the distinction between circuits, such as the Tenth Circuit, that treat the FCA's "based upon" test as meaning "supported by" and those that view the language as meaning "derived from" is that the latter hold the public disclosure bar to operate only when there has been an intentional use of the publicly disclosed information. A complaint thus would not be barred if the relator was unaware of the publicly disclosed information when the complaint was filed, even if that complaint would be "supported by" the public disclosure. As far as Grynberg is concerned, however, this analysis is entirely theoretical. The public disclosure on which the Tenth Circuit's "based upon" analysis relied was the public disclosure that Grynberg knew about and, by his own admission, relied upon to develop his Complaint. Thus, his claim would be subject to

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[7] A few days after filing his Complaint, Grynberg sent a copy of the complaint to the U.S. Attorney for Colorado and to the U.S. Attorney General, along with "copies of all of the material evidence and information which Mr. Grynberg possesses relating to the substantive issues alleged in the Complaint." Praxair, 207 F. Supp. 2d at 1174. The FOIA response was part of the "material evidence and information" that Relator forwarded to the government. Id. at 1184 n.21. Thus it is undisputed that the FCA complaint was based on sources that are listed in 31 U.S.C. § 3730(e)(4).

the public disclosure bar under every circuit's application of the FCA's limitation. There is simply no circuit conflict presented by the circumstances of this case that commands Supreme Court review.

III. Grynberg Is Not An "Original Source."

Grynberg's third question for review rests on the false premise that the public disclosure in the MMS FOIA response did not describe the essential elements of the transaction that Grynberg challenges. Both the district and circuit courts below understood and articulated that the fundamental transaction underlying Grynberg's complaint was that CO_2 was being measured at the plant tailgate rather than at the wellhead, and valued based on the contract price that Praxair paid Nielson for the raw gas rather than the price at which Praxair sold finished, processed products. Praxair, 389 F.3d at 1046-47, 1051; Praxair, 207 F. Supp. 2d at 1183-84. Because Grynberg cannot deny that this essential transaction was publicly disclosed in the MMS FOIA response, and that Grynberg was not the original source of that information, his petition resorts to further dissembling.

After elaborating on the additional information he developed to support his claims (Petition at 19), Grynberg challenges the Tenth Circuit as unduly restricting *qui tam* actions based on information learned from others (rather than on "direct" knowledge) (Petition at 20-21), or on publicly available information (rather than on "independent" knowledge) (Petition at 21-22). In particular, Grynberg complains that, in other circuits, a relator may rely on "direct and independent knowledge" to qualify as an original source, provided that the relator is not relying on the public disclosure. Grynberg's assessment of what the other circuits permit, however, is entirely consistent with the Tenth Circuit's analysis in this case.

There is no question that Grynberg added further details to his complaint allegations based on information that he collected from other sources. Consistent with the law elsewhere, the Tenth Circuit has held that "knowledge of the precise fraudulent submission to the Government is not necessary." Praxair, 389 F.3d at 1053. The Tenth Circuit has similarly declined to restrict original source status only to insiders, or to disqualify a relator who examines and relies upon public records. Id. What the Tenth Circuit does require, like all other circuit courts, is that the complaint not rely on a government disclosure detailing the factual underpinnings of the case. Id. at 1053-54.

Consistent with the precedent everywhere, the Tenth Circuit contrasted Grynberg with a relator who "ferreted out the alleged fraud" and "did not rely on a Government report dealing with allegations and transactions on which the current *qui tam* action is based because no such document existed." Id. at 1054. The court said "Grynberg's knowledge . . . was not independent. Unlike [a relator found to be an original source], he relied on a publicly disclosed Government document revealing the transaction forming the basis of his claim—the 1985 MMS letter [disclosed pursuant to FOIA] . . ." Id. That essential component alone takes Grynberg's claim out of the "direct and independent knowledge" category necessary for original source status. That all of his other information was derived from third parties and public sources merely confirmed that "the character of Grynberg's discovery and investigation is insufficient to qualify him as an original source." Id.

Importantly for the Court's decision on whether this case merits a grant of certiorari, Grynberg also fails the second prong of the original source test. In order to be an original source of publicly disclosed information, not only must a

relator have direct and independent knowledge of the information on which the allegations are based, the relator must also voluntarily provide that information to the government before filing a *qui tam* complaint. Although the Tenth Circuit did not reach this question, the district court did and the pertinent facts are not in dispute.

Grynberg filed his initial Complaint on January 7, 1998. Grynberg did not provide the government with the "information on which the allegations are based" until two days later. Thus, as the District Court explained, Grynberg "did not make the jurisdictional pre-filing disclosures required by the FCA." Praxair, 207 F. Supp. 2d at 1185-86.

Grynberg's arguments regarding original source are moot; even if he were correct (and he is not), the result will not change. Grynberg has not met the jurisdictional hurdles, and this failure is based on his own failure to follow the statute, not on any court's interpretation and application of the FCA.

IV. There Is No Reason For This Court To Review The Tenth Circuit's Ruling That Praxair Was A Prevailing Party Under The FCA.

Grynberg's Petition does not allege a valid basis for this Court to review the Tenth Circuit's ruling concerning Praxair's prevailing party status. Although the Petition's concluding paragraph asserts that this Court should settle the "conflict between the circuits over whether dismissal for lack of subject matter jurisdiction alters the legal relationship between the parties such that a defendant becomes a 'prevailing party' under the FCA or comparable fee-shifting statutes," (Petition at 28) the purported circuit conflict is dubious. Indeed, Grynberg admits that no other circuit court opinions have addressed whether a defendant securing

dismissal of an FCA action based upon the jurisdictional limitations in § 3730(e)(4) is a prevailing party under the attorneys' fees provision in § 3730(d)(4). Nonetheless, Grynberg attempts to manufacture a circuit split by focusing on distinguishable cases decided outside of the FCA context.

Quoting Farrar v. Hobby, 506 U.S. 103, 111 (1992), Grynberg acknowledges that "the touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." (Petition at 26-27.) Grynberg, however, never discusses whether the dismissal of his claim pursuant to § 3730(e)(4) materially altered the his legal relationship with Praxair. Instead, citing a series of cases in which claims were dismissed on procedural grounds, Grynberg attempts to extrapolate a blanket rule that there is no prevailing party in a case dismissed for lack of subject matter jurisdiction. Only two of the cases Grynberg cites, Branson v. Nott, 62 F.3d 287 (9th Cir.), cert. denied, 516 U.S. 1009 (1995) and Keene Corp. v. Cass, 908 F.2d 293 (8th Cir. 1990) involve defendants who successfully had a claim dismissed on jurisdictional grounds.[8] In both of those

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[8] The other cases upon which Grynberg relies are factually inapposite. Finn v. United States, 856 F.2d 606 (4th Cir. 1988) concerned whether a *plaintiff* whose case was dismissed for lack of subject matter jurisdiction was a prevailing party under the "catalyst" theory (allowing plaintiffs to seek attorneys' fees where their unsuccessful legal actions were a catalyst for the change sought in the actions). Similarly, in Jackson v. Chater, 94 F.3d 274 (7th Cir. 1996), the issue was whether a *plaintiff* who succeeded in having her social security case remanded to an ALJ for further proceedings was a prevailing party under the Equal Access to Justice Act. Finally, in Miles v. California, 320 F.3d 986, 988-89 (9th Cir. 2003), the court ruled that a defendant who obtained dismissal of a claim based upon Eleventh Amendment immunity was a prevailing party, but stated only in dicta that the defendant would not have been a prevailing party if the underlying action were dismissed for lack of subject matter jurisdiction. Accordingly, these decisions neither conflict with the Tenth Circuit's ruling or undermine its validity.

cases, the courts dismissed actions brought under 42 U.S.C. § 1983 because the actions sought impermissible federal review of a state court decision. Grynberg's reliance on these cases is misplaced, however, because dismissal under 31 U.S.C. § 3730(e)(4) is fundamentally different than the dismissals in Branson and Keene.

Until 1986, the FCA required district courts to dismiss *qui tam* actions that were based upon information that the Government had when the action was brought. See Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 945 (1997). Congress, however, amended the FCA to permit *qui tam* actions based upon the information in the government's possession, so long as the information had not been publicly disclosed or, if it had been, that the party bringing the action was the original source of that information. 31 U.S.C. § 3730(e)(4)(A). Congress described the original source and public disclosure limitations in jurisdictional terms, stating that "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." Id. Despite being labeled "jurisdictional," this Court has recognized that the limits imposed by § 3730(e)(4) are substantive and impact the legal rights of the parties:

> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 [FCA] amendment, however, does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none

> previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well.

Hughes, 520 U.S. at 951, accord Austria v. Altmann, 541 U.S. 677, 124 S. Ct. 2240 n.15 (2004).

Thus, unlike Branson and Keene, where the courts' dismissals for want of subject-matter jurisdiction concerned the proper forum for the claims asserted (state versus federal), the Tenth Circuit's dismissal of Grynberg's claim pursuant to § 3730(e)(4) involved his substantive rights and materially altered the legal relationship of the parties. Instead of ruling that Grynberg's claim was not before the proper body, the Tenth Circuit ruled that Grynberg had no legal entitlement to bring any FCA claim in any forum. Applying the rule set out by this Court in Farrar, the Tenth Circuit held that:

> [T]he result of the district court's summary judgment decision materially changed the legal relationship between Grynberg and Praxair. Grynberg's campaign to declare Praxair an entity "causing" a false claim to be made has reached final resolution. As Grynberg is now prohibited from bringing further claims on these facts, Praxair is a prevailing party.

Praxair, 389 F.3d at 1057. Accordingly, the Tenth Circuit's ruling is neither at odds with other decisions, nor legally flawed.

Citing Hewitt v. Helms, 482 U.S. 755, 760 (1987), Hanrahan v. Hampton, 446 U.S. 754, 757 (1980) and Horner v. Kentucky High School Ass'n, 206 F.3d 685, 698 (6th Cir. 2000), Grynberg asserts that Praxair also must have some success "on the merits" in order to be a prevailing party

under § 3730(d)(4). In all three of these cases, however, the issue was what level of success a civil rights *plaintiff* must achieve in order to be considered a prevailing party under 42 U.S.C. § 1988. Unlike a plaintiff, the objective of a defendant is the dismissal of an action without a finding of liability. Accordingly, a defendant can "prevail" without a decision on the merits. Moreover, even if this Court agrees with Grynberg's position, dismissal under 31 U.S.C. § 3730(e)(4)(A) would qualify as a decision on the merits. That section sets out substantive requirements for a *qui tam* claim—that the claimant is the original source of the information underlying his or her claims or that the information was not publicly disclosed. In this case, the district court and Tenth Circuit ruled against Grynberg because he failed to prove that substantive element.

V. There Is No Reason For This Court To Review The Tenth Circuit's Ruling That § 3730(d)(4) Permits An Award Of Attorneys' Fees To A Defendant That Succeeds In Dismissing A Frivolous FCA Claim Under § 3730(e)(4)(A).

As with the prevailing party issue, Grynberg concedes the absence of conflicting decisions concerning the impact of a dismissal for want of jurisdiction on the attorneys' fees provision in § 3730(d)(4). Although Grynberg asserts that the Tenth Circuit's ruling on this issue raises "important questions of federal law," his discussion of the alleged importance is limited to a partial quotation of Supreme Court Rule 10(c). Grynberg never explains why the Tenth Circuit's ruling concerning the interplay between the substantive requirements set out in § 3730(e)(4) and the attorneys' fee provision for frivolous claims in § 3730(d)(4) is important enough to warrant review. Moreover, the importance Grynberg assigns to the Tenth Circuit ruling is completely at odds with the history of those provisions as set out in his

Petition. Grynberg suggests that legions of decisions have scrutinized § 3730(e)(4), but admits that in the 19 years since Congress amended the FCA to add that restriction, the Tenth Circuit is the *only* federal appellate court to examine whether dismissal under § 3730(e)(4) prohibits an award of attorneys' fees under § 3730(d)(4).

In an effort to cloud the issues and evoke images of conflict and error, Grynberg claims that the Tenth Circuit's ruling and Citizens for a Better Environment v. Steel Co., 230 F.3d 923 (7th Cir. 2000), cert. denied, 532 U.S. 994 (2001), a case upon which the Tenth Circuit relied, are at odds with other circuit's rulings. The four allegedly contradictory cases, however, do not involve the FCA and are readily distinguishable. Three of the cases concern requests for prevailing-party attorneys' fees under 42 U.S.C. § 1988. See Branson, 62 F.3d at 291; Ass'n for Retarded Citizens v. Thorne, 68 F.3d 547 (2d Cir. 1995); Keene, 908 F.2d at 296. The fourth case, W.G. v. Senatore, 18 F.3d 60 (2d Cir. 1990), concerns 20 U.S.C. § 1415(e)(4)(B), an attorneys' fees provision in the Individuals with Disabilities Education Act ("IDEA").

In each of the four cases, the courts focused on the structure or language of the particular statute at issue and did not purport to establish a blanket rule for attorneys' fees awards in cases dismissed for lack of subject matter jurisdiction. In Branson and Keene, both courts based their rulings on the fact that "section 1988 does not by its terms confer subject matter jurisdiction upon federal courts, but rather relies on provisions of other federal statutes . . . to confer jurisdiction." Branson, 62 F.3d at 293; Keene, 908 F.2d at 298. At the same time, the courts recognized that an absence of subject matter jurisdiction might not preclude an award of attorneys' fees in other contexts. See Branson, 62 F.3d at 293 n.9 (recognizing "some circumstances in which

attorneys' fees or costs may be imposed even where the court proves to be without subject matter jurisdiction," including under 28 U.S.C. §§ 1919 and 1447(c)); Keene, 908 F.2d at 298 n.6 (reserving judgment "on the propriety of awarding attorneys' fees under Federal Rule of Civil Procedure Rule 11 in instances where the lawsuit must be dismissed for lack of subject matter jurisdiction").

Similarly, in Senatore, the court focused on language in the IDEA that "specifically limits judicial discretion to award attorneys' fees to 'any action or proceeding brought under this subsection.'" 18 F.3d at 64-5. The court recognized, however, that attorneys' fees could be awarded in the absence of subject matter jurisdiction under Federal Rule of Civil Procedure 11, 28 U.S.C. § 1919 and 28 U.S.C. § 1447(c). Id. at 64 n.1. Accordingly, the conflict that Grynberg alleges would exist only if § 3730(d)(4) was analogous to the fee provisions in § 1988 and the IDEA, an erroneous proposition that Grynberg never even asserts.[9]

Section 1988 is a general fee-shifting statute that permits courts to award attorneys' fees to a prevailing party in claims brought under a variety of federal civil rights statutes.[10] As

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[9] In Thorne, the fourth case upon which Grynberg relies, the court simply relies on the holding in Branson, Keene and Senatore. See Thorne, 68 F.3d at 552.

[10] "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. §§ 1681 et seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. §§ 2000bb et seq.), the Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C. §§ 2000cc et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d et seq.), or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held

recognized in Branson and Keene, § 1988 is separate from the statutes to which it applies, and relies upon those statutes as a basis for subject matter jurisdiction. See Branson, 62 F.3d at 293; Keene, 908 F.2d at 298. Section 1415(e)(4)(B) of the IDEA permits a court to "award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party" in an action or brought under the IDEA. 20 U.S.C. § 1415(e)(4)(B). The section applies only to prevailing *plaintiffs* and thus dismissal for lack of subject matter jurisdiction unquestionably precludes an award of attorneys' fees under § 1415(e)(4)(B).

By contrast, the fee provision in § 3730(d)(4) and the "jurisdictional" provision in § 3730(e)(4) are inextricably bound and designed to work in tandem. Congress added both sections to the FCA at the same time and intended that § 3730(d)(4) protect defendants against potential abuses created by § 3730(e)(4)'s expansion of FCA claims. See United States ex rel. Barajas v. Northrop Corp., 5 F.3d 407, 410 n.9 (9th Cir. 1993) ("To balance the incentive to bring suit provided by the "original source" and damages provisions, Congress authorized the award of attorneys' fees and expenses to prevailing defendants if an action is frivolous, harassing, or vexatious."), cert. denied, 511 U.S. 1033 (1994). Accordingly, unlike § 1988 and § 1415(e)(4)(B), § 3730(d)(4) is specifically designed to protect defendants from parasitic plaintiffs bringing frivolous claims.

In addition, because § 3730(d)(4) only applies to cases that are "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment," fee awards under this

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liable for any costs, including attorneys' fees, unless such action was clearly in excess of such officer's jurisdiction." 42 U.S.C. § 1988(b).

section are in the nature of Rule 11 sanctions. See Simpson v. Lear Astronics Corp., 77 F.3d 1170, 1177 (9th Cir. 1996) (ruling that the test for awarding fees under § 3730(d)(4) is the same as the test for imposing Rule 11 sanctions); United States ex rel. Tingley v. 900 Monroe, LLC, No. 1:02-cv-319, 2003 U.S. Dist. LEXIS 11630 (W.D. Mich. Jun. 13, 2003) (describing fees under §3730(d)(4) as sanctions); United States ex. rel. Stewart v. Fleet Fin. Group, No. 1:98cv75, 1999 U.S. Dist. LEXIS 13624 (S.D. Mich. Aug. 31, 1999) (same), aff'd, 229 F.3d 1154 (6th Cir. 2000)). This Court has recognized the authority of district courts to award Rule 11 sanctions after dismissing an underlying action for lack of subject matter jurisdiction, see Willy v. Coastal Corp., 503 U.S. 131 (1992), and that same authority supports the Tenth Circuit's ruling in this case.

Finally, even if it were generally inappropriate for a district court to award attorneys' fees after dismissing an underlying action for lack of subject matter jurisdiction, the Tenth Circuit's ruling would still be appropriate. As explained above, describing § 3730(e)(4) as "jurisdictional" is somewhat of a misnomer because that section establishes substantive requirements for qui tam actions. Accordingly, dismissal under that provision is not merely a finding that a claim is not properly before the district court, but is also a ruling that the plaintiff cannot prove essential elements of his or her case. In light of these differences, Branson, Keene, Senatore and Thorne are not at odds with the Tenth Circuit's decision.

Although the Tenth Circuit is the only federal appellate court to issue an opinion concerning the propriety of awarding attorneys' fees under § 3730(d)(4) in an FCA case dismissed under § 3739(e)(4), all of the lower court decisions addressing this issue support the Tenth Circuit's ruling. See United States ex rel. Phipps v. Comprehensive

Cmty. Dev. Corp., 152 F. Supp. 2d 443, 455-56 (S.D.N.Y. 2001) (permitting defendant to file an application for fees under § 3730(d)(4) in case dismissed for lack of subject matter jurisdiction); United States ex rel. Herbert v. Nat'l Acad. of Scis., No. 90-2568, 1992 W.L. 247587, at *7-*9 (D.D.C. Sept. 15, 1992) (awarding attorneys' fees under § 3730(d)(4) and Federal Rule of Civil Procedure 11 in case dismissed under § 3730(e)(4); see also 1 John T. Boese, Civil False Claims and Qui Tam Actions § 4.09[B][2], at 4-196.4-197 (2d ed. 2005) (citing United States ex. rel. Stewart v. Fleet Fin. Group, No. 1:98cv75, 1999 U.S. Dist. LEXIS 13624 (S.D. Mich. Aug. 31, 1999), aff'd, 229 F.3d 1154 (6th Cir. 2000)). This support, combined with the total lack of conflicting decisions, renders review by this Court of the Tenth Circuit's decision unnecessary.

VI. Other Reasons for Denying the Writ.

Other issues not raised in the Petition also indicate that this case is not appropriate for Supreme Court review.

In addition to finding that Grynberg's action was based on a public disclosure for which Grynberg was not the original source, the District Court also found 1) that Grynberg failed to show that respondents made any knowingly false statement, and 2) that the claims were known to the government prior to 1986, when the statutory scheme provided that the government's knowledge of a claim negated the requisite intent. Praxair, 207 F. Supp. 2d at 177-82.

FCA liability may be imposed only on a person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the government. . ." 31 U.S.C. § 3729(a)(7). On consideration

of Praxair's and Nielson's motion for summary judgment, the district court found that royalties based on disclosed and approved practices cannot reasonably be treated as "knowingly false" statements meant to reduce royalty obligations, and granted summary judgment on that basis. Praxair, 207 F. Supp. 2d at 1180-81. Thus, even if Grynberg is correct on every issue presented regarding the public disclosure bar and the original source exception, the case result does not change.

Moreover, the FCA is designed to reach fraud against the government. An FCA case that is appropriate for Supreme Court review should be one in which there is at least a possibility of fraud against the government that might go unchecked without further Court intervention. That scenario is not present here. From the outset, the respondents and their predecessors have made the government fully aware of their gas measurement practices, and the government has approved those practices. Id. Being fully apprised of the respondents' practices, the government confirmed that it was "comfortable with the procedures that are being used to measure, process and maximize recovery of the CO_2 produced by these [McCallum] units." Id. at 1170-71.

BLM and MMS personnel testified under oath that they were fully aware of the relevant facts. Id. at 1171. In November 2000, while Grynberg 's case was in full swing, and after having been apprised of the "extra" information that Grynberg brought to the table regarding the alleged fraud, MMS once again approved the challenged practices. Id. at 1172-73. It could not be any clearer that the government does not believe fraud has occurred. In light of the government's explicit approval of the challenged practices, there is simply no reason for this Court to devote its resources to yet another review.

Grynberg has drawn this case out long enough. The district court found no evidence that Praxair had any involvement whatsoever in the challenged royalty calculations, reports or payments. Id. at 1186. As such, Praxair should not even be a part of this litigation.[11] Nevertheless, Grynberg has persisted in pursuing Praxair, and forced it to expend large sums defending against a frivolous case. Now Grynberg seeks to extend that run to yet another forum, and has again forced respondent Praxair to respond to the same tired arguments. It is time to end this odyssey.

CONCLUSION

The petitioner has received ample due process and justice has been done in the underlying case. The court of appeals followed settled principles of law in affirming the district court's judgment, without creating any conflict with other precedents. Even if the alternative tests proposed by the Grynberg were used, his claims would have been dismissed. In addition, Grynberg cites no authority that conflicts with or undermines the Tenth Circuit's interpretation of the FCA's attorneys' fee provision. For all the reasons discussed above, the petition for certiorari should be denied.

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[11] For this reason, the Tenth Circuit remanded the case for further proceedings (now pending) on whether Praxair should be awarded fees because Grynberg's action was frivolous. Praxair, 389 F.3d at 1058-59.

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Respectfully submitted,

MARK D. COLLEY
Counsel of Record
CRAIG A. HOLMAN
KRISTEN E. ITTIG
CAMERON W. FOGLE
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 955-3000

Counsel for Respondent Praxair, Inc.